SUPREME COURT
PERSONAL COPY OF W. JILES ROBERTS

Office-Supreme Court, U.S
FILED
JUN 10 1953
JOHN F. DAVIS, CLERK

NO. 1072

IN THE

Supreme Court of the United States

JULIAN QUINTERO, *Appellant*

v.

SINCLAIR REFINING COMPANY, *Appellee*

SUPPLEMENTAL BRIEF IN ANSWER TO THE BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

ARTHUR COMBS
State National Bank Building
Houston 2, Texas

W. JILES ROBERTS
617 Americana Building
Houston 2, Texas

Attorneys for Appellant

Alpha Law Brief Co., 402 M & M Bldg., Houston 2

NO. 1072

IN THE

Supreme Court of the United States

JULIAN QUINTERO, *Appellant*

v.

SINCLAIR REFINING COMPANY, *Appellee*

SUPPLEMENTAL BRIEF IN ANSWER TO THE BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

I.

Respondent's brief in opposition to petition for certiorari fails to consider the basic question of whether or not the jury was improperly charged on the law of the case and thereby effectively directed into returning an improper verdict in this case.

It is true that the Fifth Circuit relied upon *Neal v. Lykes Bros. Steamship Co., Inc.*, Fifth Circuit, 306 Fed. 2d 313. However, it is submitted that such decision was wrongly decided and in connection with this, counsel for Petitioner shows that except for a delay in the mails that

a petition for certiorari would have been filed in the *Neal* case, supra.

This Court in *Tiller v. Atlantic Coast Lines Railroad Company*, 318 U.S. 54, 63 S. Ct. 444, made no holding with respect to the liability of the respondent in such case but only interpreted the basic 1939 Amendment to the FELA which abolished every vestige of assumed risk, see *Tiller*, supra, p. 58 U.S., 446-447 S. Ct., where the Court says:

> "We find it unnecessary to consider whether there is any merit in such conceptual distinction between aspects of assumption of risk which seem functionally so identical, and hence we need not pause over the cases cited by the court below, all decided before the 1939 Amendment, which treat assumption of risk sometimes as a defense to negligence, sometimes as the equivalent to non-negligence. We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 Amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence'. As this Court said in facing the hazy margin between negligence and assumption of risk as involved in the Safety Appliance Act of 1893, 45 U.S.C.A. Sec. 1, et seq., 'Unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of risk under another name' and no such result can be permitted here."

In *Tiller*, supra the trial court directed a verdict against the appellant. In the present case the trial court did not direct a verdict against the Petitioner but did, by an im-

proper charge, lead the jury to believe that unavoidable accident—a specie of assumed risk—was a defense and thereby effectively led or directed the jury into returning a verdict based upon a theory of law abolished by Congress and not recognized by this Court. This was just as harmful to the injured Petitioner herein as the action of the trial court in the *Tiller* case, supra in directing a verdict against the widow of the decedent. In either event the ultimate result was the same.

Petitioner accepts, as a matter of course, the premise that he must show either that the vessel was unseaworthy or that Respondent was negligent, failing which he cannot recover, but even so he is entitled to a charge to the jury that is a correct statement of the law and which does not lead the jury into returning a verdict that applies an erroneous concept of the law for the reason that unless he is given this, then he is as effectively deprived of his rights as if he were not allowed a trial. The practical effect of an erroneous charge such as this charge is actually a greater burden to an injured workman than to bear the injury without any hope of payment because an illusory right of recovery upon the trial of his cause is held forth if he can show negligence or unseaworthiness causing his injury and the injured workman believing that the law gives him recovery upon his meeting conditions then incurs the expense and difficulty of a trial only to find that his right of recovery was an illusion promised but not to be obtained because of common law technicalities.

This Court has heretofore made it abundantly clear that the master no longer has the common law defenses available to defeat the injured employee's cause of action. See, *Rogers v. Missouri Pacific Railroad Company*, 77 S. Ct

443, p. 449, 352 U.S. 500, p. 507-508, where the Court says:

> "The employer is stripped of his common-law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit."

The Fifth Circuit in its opinion does not disagree with Petitioner as to his contention of the law but condones the submission by deciding that it was not prejudicial to Petitioner.

The Fifth Circuit recognizes the fact that a charge on unavoidable accident under the FELA is confusing and should not be given. See *Page v. St. Louis Southwestern Railway Company*, ~~32~~ 312 Fed. 2d 84 p. 93, where the Court says:

> "We would agree that ordinarily in a case under this Act a charge on unavoidable accident is confusing and tends to distract the jury's attention from the simple issues of whether the carrier was negligent and whether that negligence was the cause, in whole or in part, of the plaintiff's injury. . ."

If it is confusing to the jury, then it is prejudicial to petitioner's cause of action to charge on it and place the burden on petitioner to show that his injuries did not result from an unavoidable accident.

II.

The phrase complained of "He must prove to your satisfaction by a preponderance of the evidence", is used

only one time but taken in context as it was used at the end of the Charge with the trial court occupying the neutral position in the lawsuit and advising the jury that the Appellant was required to prove his case to a certainty (the same as satisfaction) required the Petitioner to assume a heavier burden of proof than he was required under the law to assume and resulted in Petitioner's harm especially in view of the Court's erroneous Charge on unavoidable accident. This instruction required Petitioner to prove to a certainty that his employer was negligent and/or the vessel was unseaworthy while the Court was also erroneously suggesting to the jury that Petitioner's injuries may have resulted from an unavoidable accident, both of which were erroneous and thereby deprived Petitioner of a fair determination of his rights under the applicable law.

WHEREFORE, premises considered, Petitioner prays that the petition for certiorari be granted and that upon hearing the case be reversed and remanded for new trial.

Respectfully submitted,

ARTHUR COMBS
State National Bank Building
Houston 2, Texas

W. JETT ROBERTS
617 Americana Building
Houston 2, Texas
Attorneys for Appellant

I hereby certify that I have served a true copy of the foregoing upon Respondent by mailing two copies of same to Baker, Botts, Shepherd & Coates, Honorable Wm. C. Harvin and Don F. McNiel of counsel, to them first class United States mail on this the _____ day of June, 1963.

ARTHUR COMBS